

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 10, 2021 at 1:30 p.m.

1.	<u>18-20964</u>-E-13 BRADLEY GILBREATH <u>DWE</u>-1 Peter Macaluso FREEDOM MORTGAGE CORPORATION VS.	MOTION FOR RELIEF FROM AUTOMATIC STAY 6-30-21 <u>[75]</u>
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 30, 2021. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is xxxxxx.
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Freedom Mortgage Corporation ("Movant") seeks relief from the automatic stay with respect to Bradley Jay Gilbreath's ("Debtor") real property commonly known as 1342 Muscat Cir, Roseville, California ("Property"). Movant has provided the Declaration of Maria McDevitt to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made four (4) post-petition payments, with a total of \$6,622.99 in post-petition payments past due. Declaration, Dckt. 78.

CHAPTER 13 TRUSTEE'S NON-OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Non-Opposition on July 26, 2021. Dckt. 88. The Chapter 13 Trustee informs the court that debtor is delinquent \$9,616.72 under the confirmed plan (Dckt. 52) and has paid a total of \$104,093.32.00 into their plan, to date.

Trustee further notes having disbursed \$78,735.05 towards Debtor's on-going mortgage and \$16,201.14 to the arrears. According to the Trustee's records, the Debtor is post-petition delinquent \$6,565.51.

DEBTOR'S REPLY

Debtor filed a Reply on July 27, 2021 requesting that the hearing be continued where there are material disputed facts regarding the value of the Property. Dckt. 90. Debtor's Counsel asserts that after being unable to reach Debtor, he did a preliminary search on the internet which seems to indicate that Debtor has been dead since April 2019. Counsel explains that he has personally driven by Debtor's residence which seems to be occupied by Debtor's family. Debtor's Counsel also states that after reviewing values for property around Debtor's neighborhood, the Property has a minimum value of \$545,000.00. With Movant stating the debt is \$318,080.73, Counsel argues that there seems to be an excess of \$200,000 in equity and therefore Movant is adequately protected.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$318,080.73 (Declaration, Dckt. 78). Debtor first valued the Property at \$340,000.00, as stated in Schedules A/B and D, when Debtor first filed on February 21, 2018.

Debtor's Counsel indicates that Debtor died April 2019. The court is concerned that in over two years no one obtained information regarding Debtor.

Need for Appointment of a Personal Representative for the Deceased Debtor

At a recent hearing on the Motion to Dismiss filed by the Chapter 13 Trustee, Debtor's counsel recounted his efforts to first locate the Debtor, and then upon learning of Debtor's death, communicating with Debtor's family members. Debtor's counsel, as stated in the reply, argued that there is a substantial equity in the property.

The court noted that if family members did not step forward, Debtor's counsel could seek appointment of a representative or the court could convert this to a case under Chapter 7. If such substantial equity exists, the bankruptcy estate should not forfeit that due to the death of the Debtor.

At the hearing, **XXXXXXX**

11 U.S.C. § 362(d)(1): Existence of Apparent Equity Cushion

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.* In this case, the equity cushion in the Property for Movant's claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

In the three years since Debtor filed this case property values have greatly increased. It appears "logical" that Debtor's/the Estate's (if the case is converted) Property has been affected as well and thus there may be equity to properly protect Movant.

XXXXXXX

~~The court shall issue an order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion for Relief from the Automatic Stay filed by Freedom Mortgage Corporation ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is **XXXXXXX**.~~

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 10, 2020. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is XXXXX.

HSBC Bank USA, N.A., as Trustee on behalf of ACE Securities Corp. Home Equity Loan Trust and for the registered holders of ACE Securities Corp. Home Equity Loan Trust, Series 2006-ASAP6, Asset Backed Pass-Through Certificates ("Movant") seeks relief from the automatic stay with respect to Gregory Roger Borgerson and Cherie Marquez Borgerson's ("Debtor") real property commonly known as 2105 Pimlico Court, Lincoln, California ("Property"). Movant has provided the Declaration of Miguel Baque to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made three (3) post-petition payments, with a total of \$4,192.96 in post-petition payments past due. Declaration, Dckt. 77.

CHAPTER 13 TRUSTEE'S RESPONSE

David P. Cusick ("the Chapter 13 Trustee") filed a Response on December 16, 2020. Dckt. 81. Trustee points out that Debtor have no confirmed plan and informs the court that Debtor are delinquent in plan payment under their last proposed plan. *Id.*, at 1. Trustee further states having disbursed a total of \$9,515.14 towards Debtor's mortgage where Movant has filed Proof of Claim 7-1 for

the secured amount of \$353,696.28 and \$27,534.93 in arrearage. *Id.*, at 2.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on December 29, 2020. Dckt. 94. Debtor asserts that the motion should be denied on the basis that Debtor has filed a third amended plan which provides for on-going mortgage payments and post-petition arrearage payments to Movant and that a loan modification application is currently being considered by Movant. *Id.*, at 1-2. Adding that a loan modification has also been submitted with the creditor that has a second deed of trust on the Property. *Id.*, at 2.

According to Debtor, final decisions on both loan modifications are still pending and Debtor should be allowed to continue making adequate protection payments. *Id.* Moreover, Debtors argue that a small equity cushion exists if the court disallows Movant's collection of the \$10,126.49 of cost arrearage claimed in Movant's motion. *Id.*

Debtor filed their Declaration in support of the Opposition. Dckt. 95. Debtors testify that their income position has improved dramatically and have filed new Schedules I and J which show that they are capable of making the mortgage payments on the two loans if they are provided loan modification relief on the arrearage. *Id.*, ¶ 7.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$331,270.11 (Declaration, Dckt. 77). Debtor values the Property at \$575,179.00, as stated in Schedules A/B and D filed by Debtor, whereas Movant's Broker's Price Opinion values the Property at \$558,900.00 (Dckt. 78).

11 U.S.C. § 362(d)(1)

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may

exceed a property's equity. *Id.* In this case, the equity cushion in the Property for Movant's claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004).

Here, there are adequate protection payments in the plan proposed by Debtor and filed on December 23, 2020. Dckt. 89. A motion to confirm has been set for hearing on February 9, 2021. Dckt. 85. The plan provides for adequate protection payments to Movant in the amount of \$1,958.30.^{FN.1.}

FN.1. In the plan, both creditors with liens on the Property are provided Janus treatment, where both creditors are listed under Class 1 and under Section 7.02 of the Additional Provisions Debtor stating that the actual treatment are adequate protection payments pending determination of the loan modification.

Moreover, Debtor testifies that they are pursuing loan modifications with both creditors submitted August 2020 which are still pending. The court notes that Movant does not address this in their motion for relief. Counsel for Debtor reports that documentation is submitted and awaiting a response.

At the hearing, counsel for Movant reported that his client has not processed a loan modification application. However, conflicting information was provided by Movant.

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized).

Based upon the evidence submitted to the court, it appears that there may be some equity and Debtor are addressing it through adequate protection payments.

Request for Attorneys' Fees

In the Motion, Movant requests that it be allowed attorneys' fees. The Motion alleges contractual grounds for such fees, in that under the loan documents Movant is entitled to its costs and expenses in enforcing its interest to the extend not prohibited by applicable law. Specifically, Page 2 Section 7(E) of the Note states:

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note, whether or not a lawsuit is brought, to the extent not prohibited by Applicable Law. Those expenses include, for example, reasonable attorneys' fees.

Movant is seeking \$1,231 in attorney's fees as a result of the fees incurred in the filing of this motion. Part of those fees include a \$181 filing fee while the remaining balance can be attributed to the amount incurred by Movant's attorneys in drafting this Motion.

At the hearing, Movant agreed to continue the hearing in light of the ongoing loan modification application efforts.

February 9, 2021 Hearing

As of the preparation of this pre-hearing disposition, no further documents have been filed updating the court regarding the loan modification.

At the hearing, the Parties agreed to continue the hearing, and have it conducted in conjunction with the continued hearing on the Motion to Confirm the Plan in this case.

March 23, 2021 Hearing

As of the preparation of this pre-hearing disposition, no further documents have been filed updating the court regarding the loan modification.

At the hearing, the Parties agreed to one final continuance to allow the Debtor to document the diligent prosecution of a loan modification.

May 11, 2021 Hearing

As of the court's drafting of this pre-hearing disposition, no further pleadings or documents have been filed with the court as it pertains to this matter.

The Chapter 13 Trustee has filed a Motion to Dismiss this case, set for hearing on May 11, 2021. The Motion was continued to 9:00 a.m. on June 16, 2021.

At the hearing, the Parties requested a further continuance of the Motion.

Trustee's Motion to Dismiss [DPC-4]

Trustee Motion to Dismiss was continued to 9:00 a.m. on June 16, 2021. Dckt. 126. At the June 16, 2021 hearing, the matter was again continued in order to allow for Debtor to continue prosecuting the case after two *Ex Parte* Motions to Approve Trial Modifications with the respective mortgage holders. Dckt. 142; see Dckt. 132 and Dckt. 138.

The hearing was continued to 9:00 a.m. on October 13, 2021. Dckt. 142.

Debtor's Ex-Parte Motions to Approve Trial Modifications

The *Ex-Parte* Motion to Approve Trial Modification with PHH (DRE-4) was granted and the order entered on June 1, 2021. Dckt. 136. The *Ex-Parte* Motion to Approve Trial Modification with

Franklin Credit Managements (BOSCO) (DRE-5) was granted and the order entered on June 13, 2021. Dckt. 141.

August 4, 2021 Hearing

As of the court's drafting of this pre-hearing disposition, no further documents have been filed.

At the hearing **xxxxxxx**

FINAL RULINGS

3. [19-21277](#)-E-13 JASON/TIFFANIE RUPCHOCK MOTION FOR RELIEF FROM
[KMM-1](#) Peter Cianchetta AUTOMATIC STAY
HARLEY-DAVIDSON CREDIT CORP 6-30-21 [[169](#)]
VS.

Final Ruling: No appearance at the August 10, 2021 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 30, 2021. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief from the Automatic Stay is granted.

Harley-Davidson Credit Corp, as assignee of Eaglemark Savings Bank ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2011 Harley-Davidson FLHX-103 Street Glide, VIN ending in 4343 ("Vehicle"). The moving party has provided the Declaration of Hemlata Mistry to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Jason Peter Rupchock and Tiffanie Ann Rupchock ("Debtors").

Movant also requests that Debtor provide valid, written proof of insurance coverage for the Vehicle.

Movant argues Debtor has not made post-petition payments, with a total of \$14,420.99 in post-petition payments past due, where the loan has matured as of July 12, 2020. Declaration, Dckt. 171.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

Trustee's Response

Trustee filed a Response on July 27, 2021 asserting that no disbursements were made to this creditor where the plan as proposed included Movant in Class 3 with the collateral to be surrendered. Dckt. 177.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$14,420.99 (Declaration, Dckt. 171). Debtor valued the Vehicle at 12,147.00, as stated in Schedules A/B and D. Movant's valuation report values the Vehicle at \$13,035.00. Dckt. 172.

A review of last three plans Debtor proposed (but not confirmed) include Movant as a Class 3 to be satisfied by the surrender of the collateral. See Dckts. 134, 146, and 164.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

Request for Injunctive Relief

Though citing only to 11 U.S.C. § 362(d) and stating grounds to have the stay "modified," in the prayer Movant requests, in addition to have the "stay" "modified," that the court issue a mandatory injunction and "Require Debtor to immediately provide valid, written proof of insurance coverage for the property, as necessary." Motion, Prayer ¶ 3; Dckt. 169.

This is not a situation where the court is not modifying, or has not previously modified, the automatic stay based on a debtor "swearing" that the Vehicle is insured, and as part of the creditor's "adequate protection" or as a condition of not modifying the stay requires a debtor to provide proof of

the insurance.

RULING

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by Harley-Davidson Credit Corp, as assignee of Eaglemark Savings Bank (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2011 Harley-Davidson FLHX-103 Street Glide, VIN ending in 4343 (“Vehicle”), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

No other or additional relief is granted.